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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 604

ALEXIS I. DUPONT BAYARD, ERWIN M. BUDNER, STANLEY ROSS, STAR PUBLISHING COMPANY, a Corporation of the State of Delaware, *Petitioners,*

v.

JOSEPH H. MARTIN, *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Chancery of Delaware, New Castle County (R. 140), is reported in 98 A. 2d 780. The opinion of the Supreme Court of Delaware (R. 160) is reported in 101 A. 2d 329.

Opinion of the Supreme Court of Delaware was filed December 1, 1953 (R. 160). Petition for rehearing filed

December 11, 1953 (R. 171) was denied December 21, 1953 (R. 178).

JURISDICTION

Order of the Supreme Court of Delaware directing entry of mandate in the form "customarily entered in causes in which the judgment of the lower court is affirmed" was entered on January 13, 1954[1] (R. 192).

Petition for certiorari was filed February 26, 1954. The jurisdiction of this court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

1. Whether mere alleged error of the Supreme Court of a state in deciding a case violates the due process or equal protection clauses of the Fourteenth Amendment of the Constitution.

2. Whether an order of a state supreme court is based on a non-federal ground adequate to support it where its affirmance of denial of temporary injunction is on the ground that the applicants have adequate remedy at law.

3. Whether a federal question claimed first to have arisen on decision of a state supreme court is timely raised when first urged, not in Petition for Re-argument, but thereafter in a Motion for Leave to File an Amended Petition for Rehearing.

STATEMENT

In brief substance, the facts are as follows:

Original Contract Between Martin, Carter and Star.

By agreement of October 3, 1946 signed by Martin, Carter and Star Publishing Company (hereinafter called "Star") (R. 92-101) Martin, sole stockholder of Star,

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[1] The same order (R. 192) also:

1. Denied the motion of petitioners for Leave to File Amended Form of Petition for Reargument, or in the alternative to have the motion itself treated as amended petition for reargument.
2. Denied motion of petitioners for special form of mandate.
3. Stayed issuance of mandate pending petition for certiorari.

entered into contract to sell all of his stock to Carter for $145,500.00, payable $10,000.00 on execution, $25,000.00 on settlement and the balance in a series of twenty-one installments maturing over a period of years (R. 94). It was further provided that to secure the unpaid balance Carter and the Star should on the settlement execute a judgment note in the amount of each installment payable on the due date thereof (R. 94).

Martin agreed to:

1. Transfer from his own name to the Star designated real property (R. 97-98).

2. Satisfy the Star's note for $8,000.00 held by him (R. 100).

3. Refrain from competition with the Star in the newspaper business for ten years (R. 101, 153).

4. Act as adviser to the Star for his lifetime for $40,000.00 payable at the rate of $100.00 per week (R. 100, 147, 154). Carter agreed to cause the Star so to retain Martin in that capacity (R. 100, 147, 153).

The agreement recited that the Star was a party in order to evidence its assent and to the end that the agreement should be "binding upon it in respect to any obligation or duty requiring performance on its part to consummate the same" (R. 93).

The initial $35,000.00 was paid and the required twenty-one judgment notes were executed by Star and Carter jointly and entered in judgment January 18, 1947 in the Superior Court of New Castle County, Delaware (R. 105, 110, 140, 161). Star, under the Carter management, paid the first five installments as they became due (R. 140, 161) but failed to pay the installment due August 1, 1949 (R. 94, 161).

and judgment thereon and as well judgment for $10,000.00 on a claim for that sum in income taxes refunded to the Star (R. 92-155). The defendants filed a motion to dismiss (R. 155). June 11, 1953 the Superior Court filed its opinion overruling defendants' contentions and denying their Motion to Dismiss (R. 153-160). The court held:

(a) The undisclosed principals, Bayard and Budner, may be sued on the 1946 contract though it was under seal (R. 155-156);

(b) The obligation of Star under the contract of 1946 upon which contract Martin relies was, contrary to defendants' contention, not merged into the judgments against Star obtained on the note securing payments provided for under the contract and "judgment obtained on a note given as collateral will not bar an action on the original debt" (R. 157-158);

(c) That the allegations are sufficient to support the theory of anticipatory breach and the claim for refund of taxes as against the motion to dismiss (R. 159-160).

There was no appeal from this decision. A counterclaim (not included in this record) was filed by petitioners and this case awaits trial (R. 162).

Instant Proceedings in Equity.

On April 7, 1953, the three defendants in No. 320, *supra*, the Star, Bayard and Budner, plus Ross, the agent for the latter two, filed a complaint in the Chancery Court. The complaint alleged that "Bayard and Budner as undisclosed principals thereby [i. e., the 1949 agreement of Ross] assumed the balance of Carter's obligation to Martin under the 1946 agreement" but that the 1949 agreement was induced by fraud and misrepresentations of Martin (R. 7).

The complaint further alleged that in the pending action (No. 320) in Superior Court by Martin against Bayard,

Budner and Star, they will have the opportunity to present arguments on Martin's claim and as well in support of their defense based on Martin's alleged fraud[3] (R. 9).

The complaint concluded that unless Martin be restrained from execution on the judgments until determination in the Superior Court action of the validity of the obligation of the plaintiffs, they are threatened with irreparable injury and loss (R. 9). The prayer was for temporary restraining order and for preliminary injunction restraining Martin from proceeding on the execution or collection of the obligations represented by Star's judgments except in the pending action at law in No. 320. The plaintiffs also prayed damages as an incident to the equitable relief (R. 10).

April 8, 1953 the Chancery Court entered its temporary restraining order and rule to show cause why preliminary injunction should not issue (R. 10, 13). On affidavits and after hearing, the Chancery Court filed its opinion July 15, 1953 (R. 144). It concluded:

1. That the plaintiffs had failed to show reasonable probability of establishing the fraud of Martin in his action against them (R. 143-144) or irreparable injury (R. 144). It held:

> "It is admitted by plaintiffs that they can readily pay the amount of these judgments. There would therefore be no embarrassment to them which might be caused by a sale of any of their assets. There is no assertion of insolvency on thepart of defendants. I do not therefore see how any irreparable injury could ensue to either of the parties."

Accordingly the Chancery Court entered its order denying preliminary injunction and dissolving the temporary restraining order (R. 144-145).

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[3] The complaint noted that in Nos. 492 and 493 the order of the Superior Court denying Star's Motion to Vacate the judgments had been affirmed by the Supreme Court of Delaware on the ground that Star was not injured by any fraud in connection with the 1949 agreement of Ross, Bayard and Budner.

On appeal, the Supreme Court of Delaware affirmed in an opinion holding (R. 160-171):

1. There is no threat of irreparable injury. The remedy at law is adequate (R. 166-168).
2. There is no basis for plaintiffs' assertion that Star is a mere accommodation endorser.

It referred to its prior opinion in (*Star Publishing Co.* v. *Martin*, 95 A. 2d 835) Nos. 492 and 493 affirming the trial court's holding that Star received valuable consideration under the terms of the 1946 contract (R. 169). It concluded with statement of the general rule that the simple assertion of a counter-obligation does not call for equity intervention to halt an execution (R. 169-170).

TARDY EFFORTS TO INJECT FEDERAL QUESTION

Petition for Re-argument was timely filed by petitioners on December 11, 1953 (R. 171-178). It merely concludes:

> "If Delaware courts are powerless to prohibit this shocking abuse of the judicial process, then constitutional 'due process' and an orderly system of law are dead, syllogism and semantics notwithstanding."

This petition was denied December 21, 1953 (R. 178).

Petitioners sought to inject a federal question by filing on December 23, 1953 Motion for Leave to File an Amended Form of Petition for Re-argument (R. 181). It sought to amend the already denied Petition for Re-argument so as to allege that the "opinion" of the Supreme Court of Delaware amounts in law to:

A denial of due process under the Fourteenth Amendment in allegedly finding Star was not intended to be a surety in the 1946 and 1949 transactions because such finding is not supported by the substantial evidence in the record (R. 181-182).

A denial of equal protection of law under the Fourteenth Amendment because it applies to appellants a rule different

from the statement in *Staats* v. *Herbert*, 4 Del. Ch. 508, 517-519, that it is the duty of the Chancery Court "to restrain a judgment creditor from using a judgment contrary to its real design (R. 181-182).

Leave to file was denied by the Supreme Court of Delaware January 13, 1954 (R. 199).[4]

The petitioners renewed their effort to inject a federal question by Motion for Certification of the Delaware Supreme Court that the alleged federal questions had been raised in their petition for re-argument and motion for special mandate filed December 23, 1953 (R. 193-194). This motion was denied January 26, 1954 (R. 195-196).

ARGUMENT

The petition fails to show any basis for invoking this court's jurisdiction under the statute relied upon. It is merely an effort to convert what is at most mere error of the state court into a federal question.

Apparently[5] petitioners' contentions are:

1. That the Supreme Court of Delaware in its opinion of December 11, 1953 for the first time held the Star to be a principal obligor on the 1946 contract with Martin. Because this is allegedly based on a finding of fact completely without evidence to support it, it therefore denies them due process (Petition, pp. 2-3). Apparently petitioners assume that Star's liability on the collateral judgment notes necessarily excludes liability as principal obligor (Pet., pp. 9, 12-13, 15).

2. That the opinion of the Delaware court departs from prior Delaware decisions as to:

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[4] The court in the same order denied petitioners' renewed motion for a special mandate (R. 178, 183) based on the theory that the court had not in fact made the criticized finding because for it to do so would be unconstitutional (R. 179).

[5] Uncertainty as to petitioners' contentions is a burden under which they have long labored. *Star Publishing Co.* v. *Martin*, 95 A. 2d 835, 838 R. 168.

Agreement of October 12, 1949 with Ross, as Agent for Bayard and Budner.

On October 12, 1949, Carter, finding Star in financial difficulties, entered into agreement to sell to Ross, later discovered to have been acting as agent for Bayard and Budner, 87.5% of the outstanding stock of Star, all of which was owned by Carter (R. 140). Ross, as agent for the same undisclosed principals, also entered into agreement with Martin reciting that Martin had agreed to release Carter from the 1946 agreement "upon Ross agreeing to assume the obligations thereunder." Ross, in consideration of such release, agreed to execute judgment notes in favor of Martin in the number and amount of those executed by Carter then remaining unpaid "subject to the same terms and conditions" (R. 106). Ross executed these notes but they were never entered as judgments (R. 154).

Martin in turn executed the release to Carter of all obligations to Martin including the liability on the series of judgments entered against Carter and Star on their notes, but reserving his rights against Star on the judgments (R. 106-107). The Star in consideration of the release by Carter of a claim against it for $19,362 agreed to Martin's release of Carter and that such release should not release Star (R. 107-108).

Thereafter Bayard and Budner assumed management of Star but the August 1951 and February 1952 payments fell in default (R. 89, 141).

Proceedings at Law.

Nos. 492 and 493—1947 Term: Star's Motion to Vacate Judgments.—On March 24, 1952 Martin caused execution to issue against Star on the two judgments then in default, Nos. 492 and 493 (R. 8, 111, 141). The Star on March 31, 1952 filed a motion in Nos. 492 and 493 to open and vacate the judgments against it praying that the executions be

stayed on the grounds, *inter alia,* that the judgments had been obtained by fraud and entry of the judgments was a fraud upon the court (R. 141). Martin moved to dismiss (R. 148).

On November 5, 1952 after a hearing on depositions and affidavits the Superior Court filed its opinion on the Star's motion (R. 147-152). The court held bad the Star's contentions that there was no consideration moving to it for the notes and that they had been invalidly executed. Finally, it held that there had been no fraud by Martin either at the time of the original agreement with Carter and Star in 1946 or at the time of the sale by Carter to Ross, as agent, in 1949 (R. 147-152).

On March 26, 1953 the Supreme Court of Delaware affirmed in an opinion not included in this record.[2] *Star Publishing Co.* v. *Martin,* 95 A. 2d 835.

No. 320—1952 Term: Martin's Action for Anticipatory Breach of Contract and Defendant's Motion to Dismiss.— On April 18, 1952 shortly after the filing of Star's motion to vacate the judgments, Martin in a new action filed a complaint against the Star, Bayard and Budner in the same Superior Court for New Castle County on the theory of anticipatory breach of their contracts (R. 85). It alleged breach by the Star of its contract dated October 3, 1946 (R. 91). It also alleged that by virtue of the agreement and judgment notes executed October 12, 1949 by Ross (R. 105-106) the individual defendants, Bayard and Budner, his principals, assumed all of the obligations of Carter under the original agreement of 1946 (R. 91) and had breached that agreement (R. 91-92). The prayer was for acceleration of the remaining installments of $54,000.00

[2] The Supreme Court of Delaware had earlier filed an opinion in that case on March 5, 1953 denying the Star's motion to remand for the taking of newly discovered evidence (*Star Publishing Co.* v. *Martin,* 95 A. 2d 465, 470 (1953)). This opinion is not in the record.

(a) Basis for issuance of preliminary injunction (Pet., pp. 2-4).

(b) Right to injunction against execution on a law judgment beyond its intended purpose as stated in *Staats* v. *Herbert,* supra.

I. No Federal Question is Presented.

Taking the aspect most favorable to petitioners,[6] it is clear that at most petitioners allege mere error by the Supreme Court of Delaware as to matters involving no federal question because purely of state cognizance.

If immunity from judicial error were within the protection of the Fourteenth Amendment, every erroneous decision by a state court would come here as a constitutional question. This court has long held that the due process clause of the Constitution of the United States does not guarantee that the decisions of state courts shall be free from error. The mere fact that a state court has rendered an erroneous decision on a question of state law or has overruled or departed from principles or doctrines of previous decisions on which a party relied does not give rise to a claim under the due process clause of the Fourteenth Amendment. *Central Land Co.* v. *Laidley,* 159 U. S. 103, 110-112; *Tracy* v. *Ginzberg,* 205 U. S. 170, 177-178; *McDonald* v. *Oregon Navigation Co.,* 233 U. S. 665, 669; *Dunbar* v. *City of New York,* 251 U. S. 516, 519; *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 450; *American Ry. Express Co.* v. *Kentucky,* 273 U. S. 269, 273; *Gryger* v. *Burke,* 334 U. S. 728, 731.

Neither does the equal protection clause assure uniformity of state judicial decisions. *Milwaukee Electric Ry. Co.* v. *Milwaukee,* 252 U. S. 100, 106. See *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 680. These decisions clearly dispose of the petitioners' contention based on alleged

[6] We, of course, do not concede inadequacy of evidence or departure from the prior course of decisions.

departure by the Delaware Supreme Court from its prior decisions.

Petitioners' contention that this court should review the record to ascertain whether it contains facts supporting the conclusion that Star is a principal obligor and more than a "mere accommodation endorser" (Pet. 2, 15) meets a number of difficulties:

First, the opinion of the Supreme Court of Delaware does not in terms hold that as a matter of law Star is a principal obligor. It merely holds that Star was something more than a "mere accommodation endorser" (R. 168). The judgment of the court does not necessarily involve a holding that Star is a principal obligor on the contract.

Secondly, the petitioners' contention is apparently posited on the invalid proposition that liability of the Star as collateral judgment debtor excludes liability on the principal obligation so secured (Pet. 2-3, 9, 15). That Star was obligated on the contract as well as on the collateral notes and judgments was evidenced by its signature thereto (R. 92, 101) supported by Martin's promises in its favor. The Superior Court earlier so found in the proceeding on the motion to dismiss Martin's action on the contract (R. 153, 157-158).

In any event, the decision of a state court upon a question of fact ordinarily will not be made the subject of inquiry by this court. *Portland Ry. Co.* v. *Oregon R.R. Comm.*, 229 U. S. 397, 411; *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243.

Neither does this case come within the exceptions that this court will review the findings of fact of a state court where a federal right has been denied as a result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make

it necessary to analyze the facts in order to pass upon the federal question. The cases cited by petitioners (Pet., p. 15) establish these exceptions but afford no help to petitioners.

Here no federal question was urged before either the trial court or the Supreme Court of Delaware. Manifestly, no federal right was denied as a result of any finding; neither was there any conclusion in respect of a federal right. None had been suggested in any Delaware court; *a fortiorari,* there was no conclusion in respect of a federal right and a finding so intermingled as to make it necessary to consider the latter in order to pass upon the former. The cases cited by petitioners (Pet., p. 15) are therefore inapplicable. *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389, 394; *Grayson* v. *Harris,* 267 U. S. 352, 357-358.

II. The Decision Below Rests on a Non-Federal Ground Adequate to Support It.

The Delaware Supreme Court held that there was no basis for equity jurisdiction because the remedy at law was adequate. It stated the test to be:

> "What injury then is here threatened which cannot be assessed so accurately or cured so completely in the Superior Court as in the Court of Chancery." (R. 166)

It concluded that there

> "has not even been a shadow of a showing that Martin is unable to respond in damages"

if the petitioners should successfully sustain the allegations of their offsetting counterclaim based on fraud (R. 168).

The judgment is thus supported by an adequate non-federal ground of decision. *McCoy* v. *Shaw,* 277 U. S. 302, 303.

III. The Federal Question Was Not Timely Raised.

Even if it be assumed that a substantial federal question was first brought into the case by the decision of the Supreme Court of Delaware, it will not be considered here. Petitioners failed to advance the question at the earliest opportunity.

Even if the judgment here attacked be assumed *arguendo* to include, as petitioners contend, a holding that Star is a principal debtor, they cannot here avail of the "surprise" exception to the rule barring consideration of federal questions first raised by petition for re-hearing (*Ohio* v. *Akron Park District*, 281 U. S. 74, 79; *Wilson* v. *Cook*, 327 U. S. 474, 485 note). Obviously, the Petition for Re-argument filed December 11, 1953 (R. 171) afforded petitioners opportunity after notice of the holding of the Supreme Court of Delaware to advance the federal questions here urged. But no federal question was there raised and petitioners thus plainly failed to raise the federal question at the earliest opportunity. The Motion for Leave to File an Amended Form of Petition for Re-argument (R. 181-182) having been denied by the Supreme Court of Delaware (R. 192) is no more timely than a second petition for rehearing, and of no more avail. It obviously comes too late. *Bilby* v. *Stewart*, 246 U. S. 255, 257.

CONCLUSION.

It is respectfully submitted that the petition for certiorari should be denied.

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